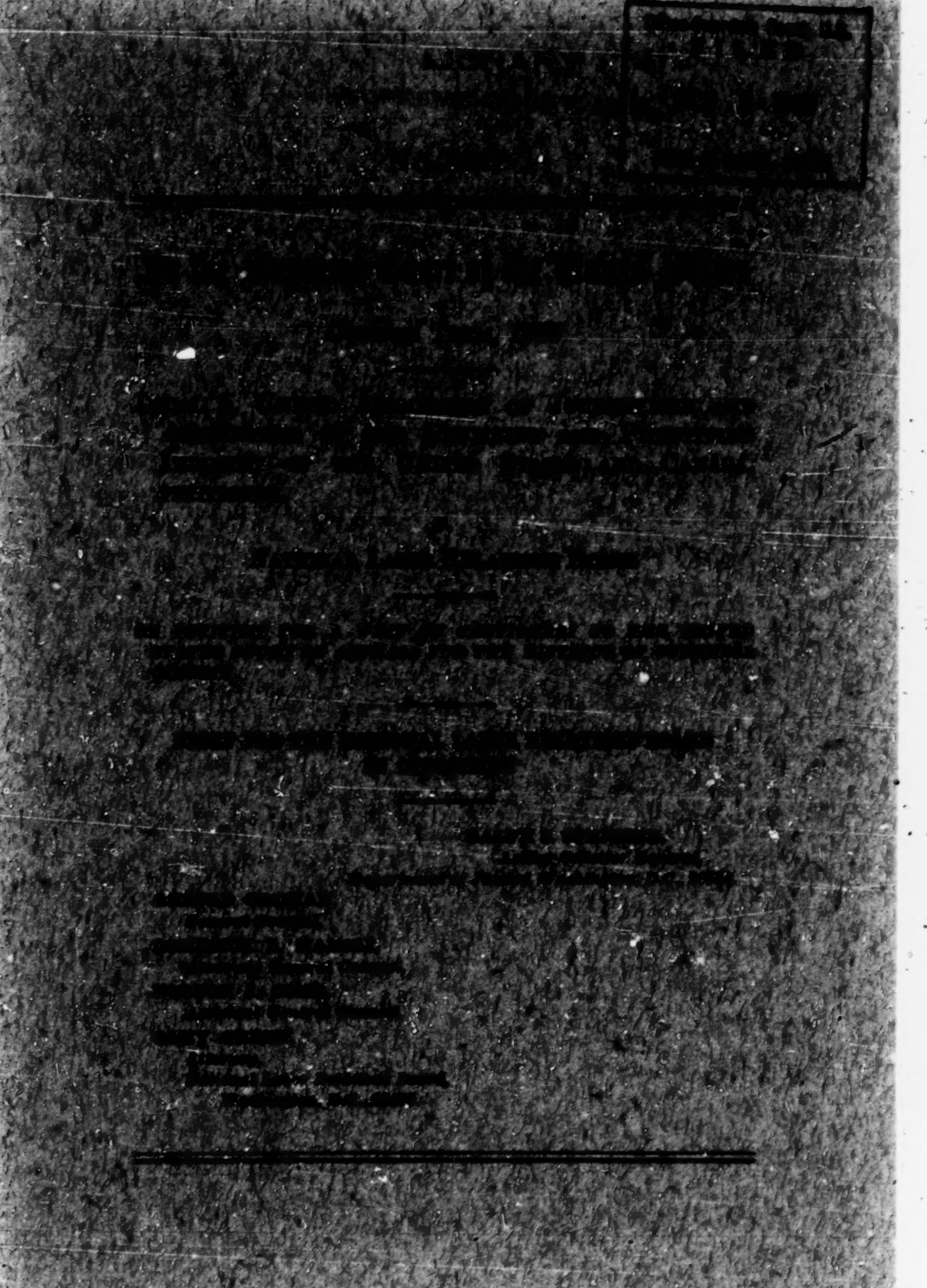

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 436

LOCAL 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–10a) is not yet reported. The Board's decision and order (J.A. 2)[1] are reported at 137 NLRB 828.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1963 (Pet. 11a). The petition for a writ of certiorari was filed on September 4, 1963. The

[1] "J.A." refers to pages of the record printed as a joint appendix in the court below.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Union's primary dispute was with the general contractor rather than with his subcontractor, so that the imposition of pressure on the latter and his employees was secondary and thus prescribed by Section 8(b)(4)(B) of the National Labor Relations Act.

2. Whether the Board is precluded from finding that the Union has violated Section 8(b)(4)(B) of the Act until it has first determined the merits of another charge arising from the same controversy, alleging that the Union has engaged in a jurisdictional strike in violation of Section 8(b)(4)(D).

STATUTE INVOLVED

The relevant statutory provisions are set forth at pp. 12a–14a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Local 5 has a collective bargaining agreement with many of the mechanical contractors who perform pipe and plumbing work in the Washington, D.C. area. (J.A. 61–62, 121). Clause 32 of the contract provides that (J.A. 125):

> It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or gen-

> eral contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. Plumbing work in this paragraph shall include the installation of all non-metallic sewers within the property line including both sanitary and storm as well as open drain tile.

Certain other contractors—known as utility contractors or excavators—also perform pipe work in connection with outside installations such as storm drains and sewer pipes. Local 5 has no bargaining agreements with, and refers no plumbers to, utility contractors: it permits its members to work only for mechanical contractors under contract with Local 5 (J.A. 62, 106).[2]

In August 1959, Arthur Venneri Company ("Venneri") was selected as general contractor for a medical library project.[3] When Local 5 learned that Venneri had subcontracted the outside utilities work to Nickles Brothers, Inc. ("Nickles")—a utility contractor, party to a collective agreement with the Laborers Union (see n. 2, *supra*)—it protested to Venneri. Local 5 pointed to Clause 32 of its area agreement and threatened to refer no plumbers to any mechanical contractor to whom Venneri might award the inside utilities work (J.A. 59, 68). Local 5 and Venneri reached a settlement of the library dispute when Venneri agreed to use plumbers to perform all

[2] The utility contractors or excavators generally have contracts with the Hod Carriers and Common Laborers Union, which claims jurisdiction over the installation of non-metallic pipe (J.A. 33).

[3] Venneri does not have a contract with either Local 5 or the Laborers.

the mechanical work on two other projects then in process (J.A. 69–70, 113–114).

In December 1959, Local 5 learned that Venneri was to be general contractor on several projects at the Andrews Air Force Base. Its business agent telephoned Joseph Venneri, vice president of the Company, and warned him to avoid a repetition of the prior "trouble" (J.A. 34; 71). However, in letting subcontracts for one of these projects (the hangar job) Venneri again awarded the outside work to Nickles. The inside work was awarded to Akron Mechanical Contractors, Inc. ("Akron"), who then entered into the Local 5 bargaining agreement (J.A. 17, 32–33, 71; 112).[4]

When Local 5 found out that Akron had taken a contract for only the inside work, it complained that this violated Clause 32 of its agreement and threatened not to supply plumbers to Akron. In February 1960, in an effort to resolve the problem, Joseph Venneri arranged a meeting with representatives of Local 5 and Akron. Venneri explained that he could not give Akron all the work because he had already bound himself by contract with Nickles, but suggested that he could ask Nickles to perform all his mechanical work, both metallic and non-metallic, with plumbers.[5] Rhodes, Local 5's business manager, re-

[4] Shortly before Akron had been awarded the subcontract, it had been warned by Local 5 that working with Venneri might mean trouble (J.A. 35; 111–112).

[5] Nickles had assigned the non-metallic pipe work to the Laborers, in conformity with the latter's work claim (see n. 2, *supra*). Its request to Local 5 for plumbers to perform the metallic pipe work had been ignored (J.A. 79).

fused the offer because "we didn't do business with excavators" (J.A. 36; 68, 73). Rhodes added that there was no possible compromise; and that, while Venneri did not have to deal with Akron or any other specified employer, he had to award all of the mechanical work (both inside and outside) exclusively to a mechanical contractor under contract with Local 5 (J.A. 36; 67, 68, 73).

Thereafter, Local 5 refused to refer plumbers to Akron for work on the hangar job at Andrews Field (J.A. 38; 57, 58, 94–95). Moreover, it induced plumbers who had been referred to Akron in connection with its other projects at Andrews to refrain from working on the hangar project, from moving shipments of pipe destined for the hangars, and from fabricating pipe to be used there (J.A. 36, 37–38; 92–93).[1]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that Local 5 violated Section 8(b)(4)(i)(B) of the Act by inducing and encouraging employees of Akron to refuse to handle or work upon materials destined for the hangar job, and Section 8(b)(4)(ii)(B) by refusing to refer plumbers to Akron for that job, as provided by the terms of its bargaining agreement with Akron. The Board found that an object of this union conduct was to force Akron to cease doing business with Venneri, or in the alternative, to force Venneri to cease doing business

[1] On these other projects, Akron had received contracts for both the inside and outside work. It was Akron's practice to shift plumbers from project to project when work on one became slack (J.A. 90, 95).

with Nickles (J.A. 3–4). The Board (with one Member dissenting) rejected Local 5's contention that, because it was merely furthering a primary dispute which it had with Akron as a result of Akron's violation of Clause 32 of the contract, it was engaged in legitimate primary activity. The Board found that the target of Local 5's action was not Akron but the subcontracting policy of Venneri, which Akron was powerless to control (J.A. 5–6). The Board (one Member dissenting) also rejected Local 5's contention that it was precluded from finding a violation of Section 8(b)(4)(B) of the Act until the merits of another charge filed against the Union, alleging a violation of Section 8(b)(4)(D), had been determined (J.A. 7–8).

The Board entered an order requiring Local 5 to cease and desist from the unfair labor practices found (J.A. 9–10).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order with a minor modification not here material (Pet. 1a–10a).

ARGUMENT

The decision of the court of appeals is clearly correct, and it is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. The Board found, and the court below sustained its finding, that petitioner's basic dispute was with Venneri, the general contractor, because of its policy

of subcontracting some of its plumbing work to "excavators" who were not under contract with Local 5; and that the pressure exerted on Akron, who was powerless to control that policy, was thus secondary and violative of Section 8(b)(4)(B) (J.A. 6; Pet. 4a, 6a). This finding is amply supported by the record,[7] and it accords with the conclusion reached in other cases involving a similar factual situation. See *Local 636, Plumbers* v. *National Labor Relations Board*, 278 F. 2d 858 (C.A.D.C.); *National Labor Relations Board* v. *Enterprise Association*, 285 F. 2d 642 (C.A. 2).

In view of the finding that Venneri was the real target, it is immaterial whether Clause 32 of petitioner's agreement with the mechanical contractors is a lawful "job protection" clause or an illegal "hot cargo" clause (Pet. 8–10). Assuming *arguendo* that it is the former,[8] the question still remains whether, in striking to enforce the clause, the union was primarily concerned with the employment policies of the employer who is party to the contract or with those of some other employer. Since the Board and the

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[7] As the court below pointed out (Pet. 4a):

"The union warned Venneri in December 1959, apparently before Akron was in the picture, not to split the plumbing work, and reminded the contractor of previous trouble they had experienced on this point. The union also warned Grossman, the president of Akron, before the bargaining agreement was signed, that accepting work from Venneri might mean trouble. Furthermore, the discussion at the meeting on February 15, 1960, between Local 5, Akron and Venneri clearly showed that the union's primary concern was with Venneri's subcontracting policies and not with the policies of Akron."

[8] Both the Board and the court below found it unnecessary to decide this issue (J.A. 6; Pet. 5a).

court below found, with ample justification, that petitioner's primary concern was Venneri, and not Akron, at least an object of its pressure on Akron was secondary and hence the contract with Akron, however lawful, cannot aid it here. As this Court held in *Local 1976, Carpenters* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, a contract provision, even if valid on its face, does not afford a defense to conduct which would otherwise violate the secondary boycott provisions of the Act.[9]

The issue here is unrelated to that in *Local 761, IUE* v. *National Labor Relations Board*, 366 U.S. 667, and *Steelworkers, Local 5895* v. *National Labor Relations Board and Carrier Corp.*, No. 89, this Term (Pet. 10, 14–15). The problem here involves determining the employer with whom the union has its primary dispute—*i.e.*, is it with Venneri or with Akron? In *Local 761* and *Steelworkers*, on the other hand, it is clear with whom the union has the primary dispute; the question is whether the right to engage in primary picketing encompasses the right to make direct appeals to the employees of the secondary

[9] Although *Sand Door* involved a typical hot cargo clause which clearly has a secondary object, such a clause was not itself unlawful under the 1947 Act under which that case arose. Nor did the court below misapply *Sand Door* (see Pet. 9–10) by viewing it as precluding the court, in determining whether the union's object is primary or secondary, from looking to the nature of the contract clause relied on by the union. As shown above, the court assumed *arguendo* that Clause 32 might have a legitimate primary object but found from all the evidence that petitioner was pursuing an object which went beyond the possible legitimate purpose of the clause.

employer at the premises of the primary employer or at a point immediately adjacent thereto.

2. The second question raised by petitioner is undoubtedly important to the building and construction industry. The industry suffers many jurisdictional disputes, and the universal practice of subcontracting makes it possible in many cases to frame the resulting unfair labor practice charges under either Section 8(b)(4)(B) or 8(b)(4)(D). There was also a division of opinion in the Board on this question. We believe, nevertheless, that the decision below is so plainly correct as to warrant denial of the petition for further review. Section 8(b)(4)(B) bars secondary pressure for an object of forcing one person to cease doing business with another. Section 8(b)(4)(D) bans strikes or related pressure (whether primary or secondary) for an object of forcing an employer "to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." Since the objectives prohibited by each section are different, it is entirely possible to find that the union has violated one section but not the other; conversely, if it be found that the union possesses both of the illegal objectives, there is no reason why its con-

duct should not be held violative of two sections of the Act rather than only one.

Nor is a different conclusion required by the circumstance that a Section 8(b)(4)(D) proceeding requires the Board first to attempt to resolve the underlying jurisdictional dispute under the procedures of Section 10(k), and that such resolution may result in the Board finding that the striking union is "entitled" to the work in dispute. Assuming that the Board were to find, in the pending Section 10(k) proceeding, that petitioner, by custom, tradition or contract, was entitled to be assigned both the inside and outside plumbing work, the Board's order in the instant case would not nullify that award by precluding a strike for the work. The order merely bars petitioner from resorting to the pressure of a strike against the secondary employer; it would not bar it from exerting pressure (such as picketing) against the primary employer even though the latter may not directly employ members of the union aggrieved. As the court below observed (Pet. 9a), this is a reasonable accommodation between Sections 8(b)(4)(B) and 8(b)(4)(D) for it simply requires the union "to restrict its pressure in such a situation to the employer who can satisfy its demands."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
*Acting Solicitor General.**

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
GARY GREEN,
Attorney,
National Labor Relations Board.

OCTOBER 1963.

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*In place of the Solicitor General, who has disqualified himself for personal reasons.